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IN THE

Supreme Court of the United States

October Term, 1954
No. 747

IRENE L. FAIRBAIRN, as Administratrix of the goods, chattels and credits of ROBERT L. FAIRBAIRN, deceased,

Petitioner,

against

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

The only question presented by the petition is, Did the District Court err in refusing to grant petitioner a continuance?

Statement of the Case

This is an action to recover damages for the death of Robert L. Fairbairn who was master of respondent's steamship ANDREW MOORE. Fairbairn was stricken with his fatal illness while the ship was on the high seas at about 12:05 a. m. September 17, 1947 and died within three hours despite the ministrations of the other officers of the vessel pursuant to medical advices received by radio. A post mortem subsequently disclosed that his death was

due to acute haemorrhagic pneumonia and no claim was made that respondent was responsible for the contraction or the onset of the illness. The only claim of liability was for an alleged failure to treat adequately during the less than three hour period between onset and death.

The case first came on for trial on January 12, 1954. Petitioner called a doctor and testified herself. Petitioner's attorney then asked the Court to order respondent to produce several officers of the vessel, Hansen, Shuck, Presnell, Frey and Gould. The Court (Weinfeld, J.) said that he would issue whatever subpoena was required and permitted petitioner's attorney to call respondent's trial counsel to the stand and interrogate them as to the whereabouts of the men named (* R. 64-72). This testimony disclosed that two of them were expected to arrive in New York that evening. Thereupon petitioner's attorney asked for a mistrial (R. 72). Respondent's counsel offered to produce in Court the following morning the two witnesses who were then expected to arrive that evening although the Court pointed out that respondent was under no duty to do so. The motion for a mistrial was denied (R. 76-8). The Court thereupon dismissed the jury for the day and petitioner's attorney immediately renewed his motion for a mistrial on the ground that he was not prepared to make a *prima facie* case (R. 79-80). The Court condemned his conduct but granted the mistrial on condition that he (Mr. Rassner) personally pay the respondent $1,000 on account of its expenses in bringing witnesses from great distances to attend the trial (R. 80-7). The following colloquy discloses the situation:

> "(72) The Court: Why do you wait until the last moment to do all this?
>
> Mr. Rassner: If the Court pleases, I explained before—

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* R. refers to the original record of the District Court which was before the Court of Appeals but was not printed.

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The Court: You didn't explain anything to my satisfaction before, and I am frank to say for the record that this is typical of the manner in which so many cases in which you represent the litigants come into my courtroom. It is an unfair thing to have their rights asserted by you. You put the Court in the position of pulling your chestnuts out of the fire.

Mr. Rassner: May I ask for a mistrial, particularly in view of your Honor's comment.

The Court: You couldn't get it on that ground because the Jury may eventually pass upon the factual issues here. What is the ground on which you are asking for a mistrial?

Mr. Rassner: So as to properly safeguard a client's rights, and I am afraid that I haven't prepared the case in a way to give the client the best benefit of my services.

The Court: Isn't that your duty, and responsibility (73) and how are we going to get rid of the calendar if you keep on?

Mr. Rassner: Haven't I pleaded guilty to this?

The Court: It isn't a mater of your pleading guilty. Another one of the rights of the people you represent, as an attorney, is to see that the calendar moves without delay. On both counts, you haven't lived up to your responsibility.

Mr. Rassner: Judge Weinfeld, I have pleaded guilty to the fact.

The Court: I am not interested in your pleading guilty.

Mr. Rassner: I have not put this case in shape. I am fully to blame for it. I am sorry it happened. I can say no more" (Appellee's Appendix, p. 2a).

"The Court: I want to say to you, Mr. Rassner, I don't want this ever to take place before me again in any other case.

Mr. Rassner: You can rest assured it won't.

> The Court: Do you have any other witness to go ahead with?
>
> Mr. Rassner: I have one member of the crew who is due here tomorrow, but that wouldn't be enough. In other words, I just made a mistake on what I had.
>
> The Court: You make these mistakes too often to suit me in these cases in which you appear before me. On one of them, I had to do all the research myself not long ago—after it was submitted" (Appellee's Appendix, p. 6a).

Counsel's claim (Petition, pp. 4-5) that a witness was persuaded to change his testimony, thus necessitating the motion for a mistrial, is emphatically denied. Counsel told Weinfeld, J. that he had "assumed that the illness report would go into evidence" (Appellee's Appendix, p. 5a). The fact is that the witness referred to did not speak with Mr. Rassner because he had been warned against it "because it is not safe" (Appellee's Appendix, p. 15-a).

Three months later, on April 8, 1954, respondent gave notice that it would apply on April 12th to set the case down for trial again on May 21st. Respondent's application was granted without opposition from plaintiff (Appellee's Appendix, p. 11a).

On May 24th petitioner applied for a continuance on the ground of unpreparedness. Respondent immediately moved to dismiss the action for failure to prosecute. Knox, J., adjourned the matter for two days to permit petitioner's attorney to make a full affidavit concerning his attempts to get ready for trial and the matter came on for argument on May 26th. Petitioner based her application on her attorney's alleged inability to find Mr. Hansen, chief officer of respondent's vessel, so that he might testify at the trial. The attorney's affidavit showed that he had done nothing whatsoever to locate or produce Hansen

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between January 12th, when the mistrial was granted, and May 26th except to send out two routine inquiries not later than January 20th and to engage a correspondent attorney on the west coast whose activities to locate Hansen were such that the affidavit did not venture to describe them. The fact is that during most of the time between the mistrial in January and the application for further continuance in May Hansen was in the Union Hall in San Francisco waiting for a job (Appellant's Appendix, pp. 6a-10a and Appellee's Appendix, p. 16a).

Against the background of the January mistrial on precisely the same ground and the apparent fact that petitioner's attorney had done nothing during the intervening five months to obtain Hansen's testimony, the Court could do nothing but deny the application if it wished to keep any control over its calendars and to protect defendants from attempts to browbeat them into submission and settlement by keeping non-meritorious cases hanging fire while putting defendants to large expense in preparing for trial over and over again. In denying the application for a continuance Judge Knox said that petitioner's attorney had not made a diligent effort to locate Hansen but had waited until the last minute although the case had been pending for more than four years (Appellee's Appendix, p. 19a).

The case proceeded to trial and respondent brought four witnesses to New York from great distances to testify. These were Gould, the ship's purser who was brought from Los Angeles, Shuck, the second mate who was brought from a point near San Francisco, Frey, the chief engineer who was brought from St. Petersburg, Fla., and Presnell, the third mate who was brought from Seaford, Del. None of these had been in respondent's employ since the end of the voyage on which Capt. Fairbairn died.

During petitioner's case petitioner's attorney called Gould to the stand and had him identify the disputed so-

called illness report which petitioner's attorney had told Judge Knox upon the application for continuance that he needed Hansen to identify. Gould testified that he (Gould) had actually written the document and that Hansen had merely signed it. Petitioner's attorney then offered the so-called report in evidence. Respondent did not object to it; it was received in evidence and was thereupon read to the jury (Appellee's Appendix, pp. 25a-27a).

Thereafter Gould, Shuck, Presnell and Frey testified fully to their attempts to treat the master, to their sending a wireless message for medical advice, to their receiving such advice, to their ministrations to the master pursuant thereto, to their putting the ship about to head for the nearest port and to the master's death within less than three hours in spite of all their efforts. Gould's testimony was included in the record before the Court of Appeals (R. 106-39).

After a trial that consumed four days, the case was submitted to the jury and a defendant's verdict ensued.

The opinion of the Court of Appeals is printed at page 13 of the petition for certiorari. The Court held that petitioner's attorney had been "inexcuseably negligent". It further held that the trial judges had shown assiduity to protect the petitioner's legitimate interests and that under the circumstances, and out of respect for its own dignity, and the need to get judicial business done, the District Court had no alternative but to do what it did. Finally, the Court held that there was nothing to show that the trial was in any way unfair or the result in any way improper.

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POINTS

I. The granting or refusal of an ap[plication for a continuance is a matter of sound judic]ial discretion.

Isaacs v. *United States*, 159 U. S. 4[87, 489;
Fidelity Co. v. *Bucki Co.*, 189 U. S. [135, 143;
Valdes v. *Central Altagracia*, 225 [U. S. 58, 73;
Yoho v. *United States*, 202 F. 2d 24[1, 242 (9 Cir.);
Locke v. *United States*, 166 F. 2d 4[49, 450 (5 Cir.);
Gross v. *Williams*, 149 F. 2d 84, 86 (8 Cir.);
Mississippi Val. Struc. Steel Co. v. *National Labor Relations Board*, 145 F. 2d 664, [666 (8 Cir.).

II. There was no abuse of discr[etion.

Against the background of the January mistrial petitioner's attorney should have been unusually diligent in locating Hansen and taking his testimony. Although Hansen during most of that time was actually available, sitting in the Union Hall day after day in San Francisco, petitioner's attorney barely turned his hand toward obtaining his testimony—see the Statement, *supra* pages 4-5. There is nothing in the record to indicate, and it has never been asserted, that Hansen was in any way under the control of the defendant, or in its employ. In these circumstances the District Court had no alternative but to deny the motion for a continuance.

III. If there was error it was ha[rmless.

The sole reason advanced in support of the application for the continuance was that petitioner needed Hansen to prove the so-called illness report (Appellant's Appendix, p. 3a). At the trial, however, respondent produced Gould, the purser, who personally wrote the so-called report. Peti-

tioner called him to the stand, had him identify the document and then offered it in evidence. No objection was made and it was received in evidence and read to the jury (Appellee's Appendix, pp. 25a-27a). Inasmuch as both the paper itself and its author (Gould) were before the jury, petitioner cannot have been harmed by Hansen's absence.

IV. The petition for a writ of certiorari should be denied.

Respectfully submitted,

EUGENE UNDERWOOD,
Counsel for Respondent.

Dated: May 18, 1955, New York, N. Y.

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